BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NORMAN R. GIDEON, JR.	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,043,042
	)	1,062,735
YOST PROPERTIES	)	
Respondent	)	
AND	)	
	)	
FIRST COMP INSURANCE	)	
ACCIDENT FUND GENERAL INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent and its carrier First Comp Insurance request review of the May 29, 2014, Order for Medical Compensation entered by Administrative Law Judge (ALJ) Brad E. Avery.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Joseph R. Ebbert, of Kansas City, Missouri, appeared for respondent and its insurance carrier First Comp Insurance (First Comp). Elizabeth R. Dotson, of Kansas City, Kansas, appeared for respondent and its insurance carrier Accident Fund General Insurance (Accident Fund).

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ.

ISSUES

This matter went to regular hearing on August 24, 2012, concerning an accident on May 18, 2008. At the regular hearing, respondent requested that claimant be examined

by Allen J. Parmet, M.D. The examination was scheduled for September 14, 2012. Claimant attended the scheduled examination, and on the trip home, was rear-ended by another vehicle, suffering injuries to his neck, low back and right upper extremity.

The ALJ found claimant's back was injured in both accidents and his upper extremity in the second accident. The ALJ noted claimant was compelled to endure the risks of driving from Pittsburg to Kansas City and back at the direction of the respondent. Therefore, the ALJ found the claimant's car accident of September 14, 2012, was the natural consequence of claimant's work-related injury of May 18, 2008. First Comp was ordered to pay medical bills related to the car accident, per Exhibit 2 to the preliminary hearing subject to the Kansas Fee Schedule, and to pay for treatment for claimant's carpal tunnel condition. The ALJ further found that Accident Fund is not liable for the costs associated with the car accident as a "new accident".

Respondent and First Comp appeal, arguing the ALJ erred in finding claimant suffered an injury in the September 2012 accident that was in the course and scope of his employment as claimant was not an employee of respondent at the time of the September 14, 2012, accident. It is also argued the ALJ exceeded his jurisdiction in finding the September 2012 accident was the natural and probable consequence of the May 2008 injury. Finally, respondent and First Comp argue the claim from September 2012 should have been part of, and litigated at the time of, the original award, as the accident occurred prior to claimant's terminal date and prior to the submission of his evidence in this case. Therefore the ALJ's May 29, 2014, Order should be reversed insofar as Docket No. 1,043,042 is concerned.

Respondent and Accident Fund argue the ALJ's Order should be affirmed as claimant was not an employee of respondent at the time of the September 14, 2012, accident. Therefore, Accident Fund is not liable for the costs of the accident and injury.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT

Claimant initially suffered injury to his low back on May 18, 2008, under Docket No. 1,043,042. Claimant received compensation and treatment for that injury. In September 2012, at the time of the regular hearing, claimant was sent by respondent and its insurance carrier at the time, First Comp, to Kansas City to see Dr. Parmet. Respondent paid claimant's mileage from his home in Pittsburg, Kansas to Kansas City, Kansas and back. On his way home from seeing Dr. Parmet, the vehicle claimant was driving was rear-ended by another going at a high rate of speed. When the vehicle struck claimant's vehicle, he was knocked around from left to right and stopped in the middle of the highway. The impact was hard enough to knock the lens out of claimant's glasses. Claimant was not

working on the day of the vehicle accident. He had not worked since the original May 18, 2008, accident.

Claimant testified he had immediate pain in his neck and down his right arm, to his index finger and thumb after the accident. An ambulance was called and claimant was examined. Even though he had pain, claimant thought he would be alright. Claimant called his attorney while at the scene of the accident and respondent's counsel was contacted. Claimant was not directed to seek care. Eventually, a new claim was filed and assigned Docket No. 1,062,735.

Claimant sought treatment for his additional injuries with Dr. Rachel Stevens. X-rays were taken of his neck and left shoulder. Claimant also had a CT scan, was sent to physical therapy and was provided epidural steroid injections.

Claimant's May 18, 2008, injury was to his low back at L1 and his mid back at T12. The September 12, 2012, injury was to his neck, left shoulder and right arm. Claimant continued to have pain in his back from the prior injury.

When this matter went to regular hearing on August 24, 2012, terminal dates for the parties were set by the ALJ, claimant's being October 23, 2012, and respondent's being November 26, 2012. Several depositions were taken after the regular hearing and prior to the expiration of the parties' terminal dates. The results of the automobile accident were not addressed in the original Award or Award Nunc Pro Tunc on December 21, 2012. The Nunc Pro Tunc Award was affirmed by the Board on June 24, 2013, with the Board's decision being affirmed by the Kansas Court of Appeals on April 11, 2014. No additional appeal from the Court of Appeals decision was taken.

Claimant was referred by his attorney to Edward Prostic, M.D., for an examination on May 21, 2013. When claimant met with Dr. Prostic the problems he was having were from the motor vehicle accident, including the neck, left shoulder and right arm. Dr. Prostic determined claimant needed further treatment for his injuries. He opined that claimant's prior work injury is the prevailing factor in causing the current injury, medical condition and need for medical treatment.

Claimant filed a new claim against respondent and its insurance company on September 14, 2012, Accident Fund Insurance Company, and was assigned a new Docket No., 1,062,735. An Application For Post Award Medical (E-4) was filed in Docket No. 1,043,042 on December 19, 2013. An Application For Preliminary Hearing (E-3) in Docket No. 1,062,735, was filed on March 5, 2014. The applications in these cases were

consolidated by the ALJ and the matters went to preliminary hearing on May 23, 2014.[1] The Order of the ALJ, issued May 29, 2014, listing both docketed cases, is the subject of this appeal.

PRINCIPLES OF LAW AND ANALYSIS

Even though both an Application For Post-Award Medical and an Application For Preliminary Hearing were filed in this matter, the parties elected to proceed as if at a preliminary hearing. Interestingly, the parties appeared to submit stipulations, similar to that prior to a regular hearing. Regardless, with the agreement to proceed as a preliminary hearing the parties have limited the Board's ability to review the ALJ's decision. The Kansas Court of Appeals has ruled that the Board and an ALJ may use the preliminary hearing procedure in a post-award medical proceeding.[2]

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

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[1] It is noted claimant filed an Application For Post-Award Medical in Docket No. 1,043,042 on December 19, 2013, and an Application For Preliminary Hearing in that same docketed matter on March 5, 2014.

[2] *See Siler v. U.S.D. 512*, 45 Kan. App. 2d 586, 251 P.3d 92 (2011), *rev. denied* (Jan. 20, 2012).

[3] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g) and K.S.A. 2012 Supp. 44-501b and K.S.A. 2012 Supp. 44-508(h).

[4] See *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

4. Is there any defense that goes to the compensability of the claim?[5]

Additionally, the Board may review those preliminary hearing orders where it is alleged that an administrative law judge has exceeded his or her jurisdiction or authority in providing or denying the benefits requested.[6]

The dispute herein centers around whether claimant suffered a new accident on September 14, 2012, or whether the auto accident on that date relates back to the original accident on May 18, 2008, as a natural and probable consequence. Thus, the issue of whether claimant suffered an accidental injury which arose out of and in the course of his employment with respondent is before the Board for its consideration.

The Board must also consider whether the ALJ exceeded his jurisdiction in awarding claimant benefits from this auto accident. It was argued at the preliminary hearing that claimant failed to properly pursue this matter prior to the expiration of terminal dates at the time of the original award. Claimant's accident occurred on September 14, 2012. Claimant's original terminal date was set at the regular hearing for October 23, 2012, with respondent's terminal date being November 26, 2012. For reasons not explained, the matter of the automobile accident was not raised or discussed prior to the expiration of claimant's terminal date. Claimant's attorney was well aware of the situation as claimant apparently called his attorney immediately after the accident occurred, but 20 months passed before this matter was taken to hearing.[7]

Respondent contends that *res judicata* applies to this claim as the issue dealing with claimant's automobile accident should have been presented prior to the issuance of the Award in this matter. The Kansas Courts have determined that a workers' compensation award is in most respects like a court judgment and subject to *res judicata*.[8]

A well settled rule or doctrine of *res judicata* is '"that when a matter in issue has once been determined it is not subject to a redetermination; that it is entitled to the

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[5] K.S.A. 44-534a(a)(2); *Carpenter v. National Filter Service,* 26 Kan. App. 2d 672, 994 P.2d 641, (1999).

[6] K.S.A. 2007 Supp. 44-551(i)(2)(A).

[7] The Board acknowledges two prior attempts at preliminary hearings in Docket No. 1,062,735 on October 1, 2013, and January 24, 2012, resulted in only minor procedural actions.

[8] See *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 510 P.2d 1190 (1973); *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 211 P.3d 175 (2009), *rev. denied* 290 Kan. 1095 (2010).

recognition of permanence and constancy always accorded a judgment.'"[9] Under the doctrine of *res judicata*, a final judgment is conclusive, not only on all matters that were actually litigated, but also on all matters *"which could have been litigated by the parties or their privies in that action."*[10]

The doctrine of *res judicata* prevents a party's attempt to litigate any claim that could have been previously litigated in another action, even if the particular theory argued in the later proceeding was not raised or considered by the court in the previous litigation.[11]

Res Judicata consists of four elements: "(1) same claim; (2) same parties; (3) claims were or could have been raised; and (4) a final judgment on the merits."[12] The automobile accident involved the same initial claim of injury, the same parties and existed before the Award was written in this matter. The ALJ ruled *res judicata* did not apply as the question of the automobile accident did not arise until after the regular or original hearing, citing *Randall.* However, the Board has determined the ALJ has defined the hearing, whether called "full", "original" or "regular" too narrowly. A "full hearing" has been identified by the Kansas courts as "the whole proceeding including the ultimate decision therein."[13] *Schmidtlien* also states:

> It is true that the term 'hearing' has both a narrow and a broad meaning. As applied to administrative proceedings the term 'hearing' is usually construed as meaning the whole proceeding including the ultimate decision therein. [Citation omitted.] The decisions recognize the term 'hearing' as relating not to physical presence at the taking of evidence, but to certain procedural minimums to ensure an informed judgment by one who has the responsibility of making the final decision and order. [Citations omitted.][14]

Schmidtlien further references *Sawyer*[15], which stated, "The phrase, 'the conclusion of a full hearing on the claim,' appearing in K.S.A. 1989 Supp. 44-534a, refers to the date

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[9] *Randall* at 395.

[10] *Stanfield v. Osborne Industries, Inc.*, 263 Kan 388, 949 P.2d 602 (1997), *cert. denied* 525 U.S. 831 (1998).

[11] *Johnson v. Johnson*, 26 Kan. App. 2d 321, 988 P.2d 244 (1999).

[12] *Winston v. Kansas Dept. of SRS*, 274 Kan. 396, 49 P.3d 1274, *cert. denied* 537 U.S. 1088, 123 S.Ct. 700, 154 L.Ed.2d 632 (2002).

[13] *Schmidtlien Electric, Inc., v. Greathouse*, 278 Kan. 810, 104 P.3d 378 (2005).

[14] *Id.* at 822.

[15] *Sawyer v. Oldham's Farm Sausage Co.*, 246 Kan. 327, 333, 787 P.2d 697 (1990).

of the award entered by the administrative law judge as a result of the hearing held after the preliminary hearing." A full hearing does not occur when a regular hearing is adjourned. The Board finds the full hearing occurred in this matter at the taking of evidence and the rendering of the ultimate decision, not literally at the time of the regular hearing. For the above reasons, the Board finds claimant is barred by *res judicata* from bringing the claim for medical care stemming from the automobile accident on September 14, 2012. The request for medical treatment as the result of the automobile accident could and should have been litigated prior to the time of the initial Award. The Order For Medical Compensation of the ALJ is reversed.

CONCLUSIONS

After reviewing the record compiled to date, the Board concludes the preliminary hearing Order should be reversed. The doctrine of *res judicata* applies to this matter and claimant is barred from further pursuing his claim for medical treatment or other benefits resulting from the automobile accident which occurred on September 14, 2012.

DECISION

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated May 29, 2014, is reversed and claimant denied further benefits stemming from the automobile accident which occurred on September 14, 2012.

IT IS SO ORDERED.

Dated this _____ day of August, 2014.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge